Supreme Court, U.S.
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No. 95-931

In The

Supreme Court of the United States

October Term, 1995

UPS WORLDWIDE FORWARDING, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONER UPS WORLDWIDE FORWARDING, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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THE POSTAL SERVICE'S BRIEF DISTORTS BOTH THE REGULATION AT ISSUE AND PETITIONER'S ARGUMENTS.

1. The Postal Service states that "[t]his case concerns . . . a program under which the Postal Service negotiates volume-based rates." Postal Service Brief at 3. However, the Postal Service later concedes that the regulation in question does *not* involve "volume-based rates," in contrast to the agency decision upon which it relies, *Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711 (1982). *See* Postal Service Brief at 13 n.8. The regulation does not require the negotiated rates to be based on volume actually tendered to the Postal Service, and a majority of the negotiated contracts do not have a minimum volume commitment. That is precisely why UPS contends – and why the district court found, UPS Petition at A51-A53 – that the regulation is unduly discriminatory under 39 U.S.C. §§ 101(d) and 403(c).

2. Although it does not argue waiver, the Postal Service suggests that Petitioner did not give the court of appeals "the opportunity to consider its current contention that . . . the lack of a volume commitment in the threshold eligibility requirements . . . is contrary to the '[e]stablished [l]aw' of undue discrimination." Postal Service Brief at 12-13. That is not so. UPS specifically addressed this issue on pages 33-34 of its brief to the court of appeals, and the court of appeals specifically decided the issue. *See* UPS Petition at A31-A34. Not only did the court of appeals have "the opportunity" to consider the issue, it actually did so.

3. The Postal Service suggests that it may negotiate special rate and service deals with favored mailers because the Federal Register notice adopting the regulation stated that the negotiated terms will be made available to any "similarly situated" mailer. Postal Service Brief at 4. The *regulation* states that the rates and services are provided "on a mailer-specific basis." UPS Petition at A66. The Postal Service does not cite even one instance where, during the twenty-two months the regulation was in effect, a "similarly situated" mailer was given a contract identical to one previously negotiated with another mailer. *See* 57 Fed. Reg. 30651, 30652 (1992) (interim regulation effective July 10, 1992).

More important, the actual contracts are not published. The Postal Service admits that "significant terms" which a mailer needs to know in order to determine if it is "similarly situated," such as the weight and size limits of the mail covered by the contract, "are not published in the Postal Bulletin" (a subscription publication which is not freely available to the general public). Postal Service Brief at 4 n.2. Furthermore, the "brief description" of contractual mailer "preparation" and "makeup" requirements, *see* Postal Service Brief at 14 n.9, that appears in the Postal Bulletin is so vague as to be completely uninformative. *See, e.g.*, UPS Petition at A69, A73. Thus, the situation here is vastly different from those in *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990), and *Sea-Land Services, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984), *see* Postal Service Brief at 13 n.8. There, the terms and conditions for obtaining the rates were embodied in publicly filed tariffs which were available for all the world to see. *See, e.g., MCI*, 917 F.2d at 38 ("What is

involved here is not the filing of contracts *qua* contracts but the filing of *tariffs based upon contracts* . . . [a]nd there is no procedural bar to a carrier's formulating a proposed tariff based upon negotiations with a potential customer"). As this Court stated in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990):

> If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published [and] known to all. . . . Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit . . . .

4. The Postal Service argues that the regulation complies with the statutory language providing for different "types" of mail service for "categories" of mail or mail users. It claims that the regulation's eligibility criteria define a "category" of mail users, and that the individual contracts with the negotiating mailers are a "type" of mail service. Postal Service Brief at 10-11. The Postal Service's definitions of "categories" and "types" shift from one sentence to the next. That is clear from the very next sentence in its brief, where it defines *each contract* as "a 'category' of mail users to which the Postal Service will provide a particular 'type' of service." Postal Service Brief at 11.

The fact remains that the negotiated contracts have rates that vary from one mailer to another. *See, e.g.*, UPS Petition at A69-A76. Under the Postal Service's approach, the terms "categories" and "types" are defined either so broadly or so narrowly, depending on the Postal Service's whim, that those terms lose all meaning.

5. The Postal Service reiterates the court of appeals' erroneous view that Congress wanted the Postal Service to be an aggressive competitor. Postal Service Brief at 3, 15. Congress intended the Postal Service to operate on a more business-like basis than when it was part of the President's Cabinet so that it could discharge its public service responsibilities more efficiently. At the same time, Congress showed concern for protecting "enterprises in the private sector of the economy" from Postal Service attempts to exploit its considerable advantages as a government run monopoly that need not pay taxes or comply with many of the laws that are applicable to its private enterprise competitors. *See* 39 U.S.C. § 3622(b)(4). Nowhere in the statute or in its legislative history is there any suggestion that Congress instructed the Postal Service to compete at all costs, or that Congress removed all restraints on the Postal Service's ability to compete. Even if there were such a suggestion, "[g]eneralized congressional exhortations to 'increase competition' cannot provide [a federal regulatory body] authority to alter the well-established statutory . . . requirements." *Maislin Industries*, 497 U.S. at 135.

THE POSTAL SERVICE'S ARGUMENTS ON THE PRESIDENTIAL CONSENT ISSUE ARE RED HERRINGS.

1. The Postal Service mischaracterizes Petitioner's position when it suggests that Petitioner asked the court of appeals "to prescribe certain procedural steps the President must take to manifest his consent to international

postal rates." Postal Service Brief at 19. There is no evidence that the President was ever even informed of the proposed agency action to which he supposedly consented. UPS therefore argued that the President must, at the very minimum, be informed of the action to which consent is required, and that the President must *actually* consent, in some manner or another. Consent may be manifested in any way the President wishes, as long as the statutory requirement of obtaining presidential consent is actually fulfilled.

2. The Postal Service resorts to the President's post-litigation Memorandum delegating to its Governors the duty to consent to international postal rates and states that Petitioner has not "argued here that the President's delegation is insufficient . . . to sustain the validity of" the regulation. Postal Service Brief at 9 n.4. But the regulation was issued *before* the President's delegation and therefore is not affected by that delegation. There is no evidence that the Governors acted after the presidential delegation to approve or re-issue the regulation.[1]

3. The Postal Service relies on an asserted "unbroken historical practice" pursuant to which "the President and postal authorities have long interpreted § 407(a) as not requiring the affirmative consent of the President." Postal Service Brief at 19, quoting the court of appeals'

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[1] Serious constitutional issues are raised by the delegation of a congressionally imposed requirement of presidential consent to the agency whose action must be consented to by the President. However, since the regulation in this case was not approved pursuant to the President's delegation, the propriety of that delegation is not at issue here.

decision, UPS Petition at A38. There is no such "undisputed historical record." UPS Petition at A24-A25. Until relatively recently, international postal rates were almost always established in postal conventions which the Postal Service concedes have always been "affirmatively" consented to by the President. The Postal Service also conceded before the district court that, even today, only 3% of all international rates would be affected by requiring the President to fulfill the congressionally-imposed duty to consent to international postal rates. *See* UPS Petition at A78.

The Postal Service's position boils down to the argument that a congressionally-imposed requirement may be read out of the statute by repeated flouting of the statutory command. But "[e]ven contemporaneous and longstanding agency interpretations must fail to the extent they conflict with statutory language." *Public Employees Retirement Sys. v. Betts*, 492 U.S. 138, 171 (1989); *accord Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 743 (1973).

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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